CHAPTER XI: Indian Child Welfare Act

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A. Introduction

The Indian Child Welfare Act is a federal statute that was adopted to protect Indian families and to preserve the ties between Indian children and their tribes. [1] At the time ICWA was passed, an extraordinary number of Indian children were being removed from their families by state courts and social services agencies and placed in non-Indian homes and institutions. For example, the American Indian Child Resource Center reports that in the 1970's 92.5% of adopted American Indian children in California had been placed with non-Indian families. This ratio for out-of-culture placement was six times more than that of any other minority group in the country. The adoption rate for Indian children was 8.4 times greater than the adoption rate for non-Indian children. There were 2.7 times as many Indian children in foster care as non-Indian children.[2]

Often state and local officials did not understand, ignored, or rejected the cultural or social customs of the child's tribal community. B.J. Jones, author of the American Bar Association's *Indian Child Welfare Act Handbook,* reports that "[i]n Minnesota, for example, an average of one of every four Indian children younger than age one was removed from his or her Indian home and adopted by a non-Indian couple. A number of these children were taken from their homes simply because a paternalistic state system failed to recognize traditional Indian culture and expected Indian families to conform to non-Indian ways."[3]

In addition, research indicated that Indian children who were cut off from their tribal communities and cultures had high rates of behavioral and emotional problems. While there is

[1] 25 U.S.C. §1901 *et seq.*
[2] *About ICWA,* American Indian Child Resource Center, http://www.aicrc.org/icwa.html (visited February 2, 2004).
[3] B.J. JONES, THE INDIAN CHILD WELFARE ACT: THE NEED FOR A SEPARATE LAW, (Chicago, Ill.: American Bar Association, 1996).

little hard research on the impact of non-Indian placement on Indian children, studies indicate that the negative effects of such placements on children may be serious. Surveys indicate that these children spend a disproportionate amount of time in remedial education programs and are often labeled "learning disabled." Often children experience difficulty reading that contributes to a lack of academic success and high school dropout rates.[4]

B. Scope of ICWA

ICWA applies to any "child custody proceeding" involving an "Indian child" in any state court.[5]

1. "Child Custody Proceedings" under ICWA

ICWA defines "child custody proceedings" to include any action involving a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement.[6]

a. "Foster care placement"

The Act defines "foster care placement" as "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated."[7] Foster care placements do not include voluntary placements of a child by his or her parent or Indian custodian.

b. "Termination of parental rights," "pre-adoptive placements," and "adoptive placements"

ICWA applies to any action involving an Indian child in which the termination of parental rights is sought. The Act applies both to private and agency adoptions and to actions to terminate parental rights. Official state involvement through, for example, a child protection action, is not required.

Child Custody Proceedings under ICWA include:

- ✓ Foster Care Placements
- ✓ Termination of Parental Rights Actions
- ✓ Pre-Adoptive Placements
- ✓ Adoptive Placements

"Pre-adoptive placement" is defined by ICWA to include "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement."[8]

Finally, ICWA defines "adoptive placement" as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."[9]

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[4] *See* Carol Locust, *Split Feathers… Adult American Indians Who Were Placed in Non-Indian Families as Children,* 13 PATHWAYS 11 (September/October 1998), *available at* http://www.oacas.org/resources/OACASJournals/2000October/Feathers.pdf (visited August 20, 2004).
[5] 25 U.S.C. § 1903.
[6] 25 U.S.C. § 1903(1).
[7] 25 U.S.C. § 1903(1)(i)
[8] 25 U.S.C. § 1901(1)(iii).
[9] 25 U.S.C. § 1901(1)(iv).

c. Private custody actions

Generally, ICWA does not apply to custody disputes between parents. However, ICWA is triggered if custody of an Indian child is to be awarded to a non-parent as a result of private custody litigation. ICWA is also triggered if a non-parent family member independently seeks guardianship or custody of a child.[10] ICWA may be triggered if a de facto custodian seeks custody of a child.[11]

In addition, ICWA does not apply to most juvenile corrections cases.[12] However, placements of juveniles resulting from juvenile status offenses where the juvenile conduct would not be criminal if the juvenile were an adult are covered by the Act.[13] Voluntary placements in which the parent or Indian custodian can regain custody of the child upon demand are also excluded from ICWA. Thus, for example, a placement under Idaho's parenting power of attorney provision[14] would not be covered by ICWA.

2. Definition of "Indian child" under ICWA

IWCA applies to "Indian children." The Act defines an Indian child as one who is a member of or who is eligible to be a member of an Indian tribe and who is a biological child of a tribal member.[15] Whether a child is a member of or eligible for membership in a tribe is determined by the tribe. Tribal determinations of membership are entitled to deference in state courts and are entitled to full faith and credit under ICWA.[16]

ICWA applies whenever a child is *eligible* for membership in an Indian tribe.

ICWA applies only to federally-recognized tribes and to Alaska native villages and corporations. Because many tribes are seeking federal recognition, the list of covered tribes and Alaskan native groups is constantly changing. The Department of Interior maintains up-to-date records of federally-recognized tribes.[17]

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[10] *See* B. J. JONES, INDIAN CHILD WELFARE ACT HANDBOOK 14 (1995) ("ICWA HANDBOOK") and cases cited therein. *See also* In the Matter of Mahaney, 146 Wash.2d 878, 51 P.3d 776 (2002)(finding that permanent award of custody to grandmother constituted a "foster placement" under ICWA), J.W. v. R.J., 951 P.2d 1206 (Alaska 1998)(award of custody to non-Indian step-parent constituted a "foster placement" under ICWA).

[11] Idaho Code §15-5-213, adopted in 2004, provides that "the court shall give the [de facto custodian] the same standing that is given to each parent under this act." It is not clear from this language whether a de facto custodian may seek any formal relationship with a child other than a guardianship. However, because a court order recognizing a de facto custodian would not be a voluntary arrangement that a parent could reverse without going to court, any action establishing such a relationship would be covered by ICWA.

[12] The Act does not apply to placements outside the home if the placement is the result of an "act, which, if committed by an adult would be deemed a crime . . .." 25 U.S.C. § 1903(1).

[13] Department of the Interior, Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg. No. 228, 67584 at B.3 (Nov. 26, 1979)("BIA Guidelines"). These guidelines, adopted by the Secretary of the Interior, do not have the force of administrative regulations. Despite the command of the Act, 25 U.S.C. §1952, the Secretary had not adopted administrative regulations. Nonetheless, because the Guidelines are the only instruction by the Secretary on the interpretation of ICWA, many courts have closely followed them. *See* ICWA HANDBOOK, *supra* note 5 at 14.

[14] Idaho Code § 15-5-104.

[15] 25 U.S.C. § 1904(4).

[16] 25 U.S.C. § 1911(d). The federal courts have long recognized that sovereignty concerns requiring tribal determinations of members are binding on state and federal courts. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The BIA Guidelines also provide that tribal determinations of membership are conclusive. BIA Guidelines, *supra* note 7 at § B.1(b)(i).

Each tribe has its own rules for determining tribal membership.[18] Thus it is imperative that the court consult the tribe directly to determine if a child is a tribal member or is eligible for tribal membership. The BIA Guidelines provide that if the tribe fails to make a determination of membership or eligibility, then determination may be made by the Department of the Interior, with its determination to be conclusive in the state court.[19] The Idaho Supreme court has held that where the tribe and the BIA are unable to make the determination of tribal membership, the state court must then make the determination.[20]

In order to ensure that the provisions of ICWA are complied with, steps must be taken in every case to determine whether the child is an Indian child. The following best practice recommendations should be followed in every case to determine a child's status:

- ✓ Ask the person referring the child, the parents, the Indian custodian, relatives, and the child (if the child is of sufficient age) whether the child is of Indian or native ancestry. Alaska Natives often use terms other than "Indian" to describe their ancestry. For this reason, inquiry should be made about "native" ancestry as well as Indian ancestry.
- ✓ Ask the person referring the child, the parents, the Indian custodian, relatives, and the child (if the child is of sufficient age) whether the child is or has been under the jurisdiction of any Tribal Court.

If there is any reason to believe that the child is an Indian child, the child's status must be verified. Thus the BIA Guidelines recommend that notice be provided to tribes for the purpose of determining whether the child is an Indian child under the following circumstances:

- ✓ A party, tribe, or private agency informs the court that the child may be an Indian child;
- ✓ A public welfare agency discovers relevant information indicating that the child may be an Indian child;
- ✓ The child believes s/he is an Indian child;
- ✓ The child's residence or domicile is an Indian community or the child's biological parents or Indian custodian is from an Indian community; or
- ✓ An officer of the court has information suggesting that the child is an Indian child.[21]

If the identity of the child's tribe is unknown, all possible tribes should be contacted as soon as possible to seek verification of the child's Indian status.

3. Existing Indian Family Exception

In addition to the actions excluded from ICWA by its express language, a number of courts have recognized an additional exception to the Act. These courts have held that the policies of the Act are not implicated if the child is not being removed from an "existing Indian family. In

[17] An up-to-date list of federally-recognized tribes is available on the Bureau of Indian Affairs website at http://www.doi.gov/bureau-indian-affairs.html (last visited October 10, 2005).

[18] Determining tribal membership is a fundamental incident of tribal sovereignty. Determinations of tribal membership or eligibility for membership are not subject to review or question by non-tribal courts or by the courts of other tribes. BIA Guidelines § B.2.

[19] BIA Guidelines § B.1(b)(ii).

[20] In re Baby Boy Doe, 123, Idaho at 469-70, 849 P. 2d at 930-31.

[21] BIA Guidelines § B.5.

Mississippi Band of Choctaw Indians v. Holyfield,[22] the United States Supreme Court considered a case in which the state court had recognized the "existing Indian family" exception to jurisdiction. Although the Court did not directly address the exception, it reversed the Mississippi court's order upholding an adoption of an Indian child. The court held that the "fact that the parents gave up the child did not defeat the application of ICWA, especially since the Choctaw Tribe had rights under ICWA that could not be frustrated by the parents' actions."[23]

Despite the holding in *Holyfield*, state courts have continued to recognize this exception.[24] Relying on *Holyfield*, the Idaho Supreme Court, however, has declined to recognize the "existing Indian family" exception.[25]

4. Definition of Parent Under ICWA

ICWA defines a parent as "any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child even under Indian law or custom." However, the definition expressly excludes an "unwed father whose paternity has not be acknowledged or established."[26]

Under this definition, non-Indian adoptive parents are not included in the definition of parents. These individuals would, of course, be consider parents under state law. This distinction is important because only "parents" under ICWA may object to a transfer of jurisdiction to tribal court. Thus, non-Indian biological parents may enter such an objection but non-Indian adoptive parents may not.

5. Definition of "Indian Custodian"

ICWA defines Indian custodian as "any person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent" of an Indian child.[27] The child's Indian custodian has virtually the same standing as a parent in ICWA cases. As the definition indicates, Indian custodians may exist as the result of informal arrangements made by parents or pursuant to tribal custom. Congress intended to recognize the important role played by the extended family in most tribal cultures. While an Indian custodian can request a transfer of a case to tribal court, the custodian cannot object to such a transfer. The only other situation in which the Indian custodian is treated differently from a parent under ICWA is where the child is removed from the custodian and returned to the natural parent under either state or tribal law.

The standing conferred by ICWA to Indian custodians differs substantially from the approach of most states. Outside ICWA, an extended family member such as a grandparent or older sibling

[22] 490 U.S. 30 (1989).
[23] ICWA HANDBOOK, *supra* note 6, at 16.
[24] State Court resistance to ICWA is discussed in Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002).
[25] In re Baby Boy Doe, 123 Idaho 464,471, 849 P 2d 925, 932(1993)("[A]pplication of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family. This would undermine the tribe's interest in its Indian children, which the Supreme Court recognized in *Mississippi Choctaw*.")
[26] 25 U.S.C. § 1903(9)
[27] 25 U.S.C. § 1903(6).

would generally only have standing to participate in a child protection case if that person had legal custody or visitation with a child pursuant to a court order.

C. Jurisdictional Provisions of ICWA

1. Exclusive Jurisdiction of Indian Children Domiciled Within the Reservation

ICWA provides that tribal courts have exclusive jurisdiction over any Indian child domiciled within the reservation of the tribe asserting jurisdiction.[28] A tribe's jurisdiction is exclusive even when the Indian child is not a member of the tribe exercising jurisdiction.[29] In addition, the tribal court retains exclusive jurisdiction over any Indian child who remains a "ward" of the tribal court, notwithstanding the child's domicile.[30] The U.S. Supreme Court upheld the exclusive jurisdiction of tribes in *Holyfield v. Mississippi Band of Choctaws*.[31]

a. Domicile on the reservation

In *Holyfield*, the United States Supreme Court held that the term "domicile" in the ICWA exclusive jurisdiction provision has the same meaning as it does for purposes of diversity jurisdiction – that is, a person is domiciled in a location if she/he resides in that location and intends to remain or, if temporarily away, to return.[32] Furthermore, the Court reasoned that the jurisdiction provisions of ICWA must be interpreted to accomplish the purpose of the Act. Thus, even a child who is temporarily residing off the reservation but who intends to return to the reservation is domiciled on the reservation. Moreover, in *Holyfield*, the Court held that twin infants born off the reservation after their mother left to escape the reach of ICWA, were "domiciled on the reservation" for purposes of ICWA because their mother was a reservation domiciliary.

For purposes of ICWA, the term "reservation" is broadly defined using the definition of the Major Crimes Act.[33] Thus the reservation includes any territory within the exterior boundaries of the reservation, including fee-held land, any dependent Indian community, and any Indian allotment and the rights-of-way running through them.

b. Exceptions to exclusive jurisdiction

i. State court emergency jurisdiction

State courts may exercise emergency temporary jurisdiction while the child is off the reservation in order to prevent immediate physical damage or harm to the child.[34] ICWA provides that such a temporary emergency placement should "terminate immediately when it is no longer necessary

[28] The only other exception to exclusive jurisdiction for reservation domiciled Indian children arises if a state has assumed jurisdiction under Public Law 280. 18 U.S.C. §1162.
[29] Twin City Construction v. Turtle Band of Chippewa Indians, 867 F. 2d 1177 (8th Cir. 1988), *vacated*, 911 F. 2d 137 (8th Cir. 1990).
[30] 25 U.S.C. § 1911(a).
[31] 490 U.S. 30 (1989).
[32] 490 U.S. at 43.
[33] 25 U.S.C. 1903(10) specifically incorporates the definition of "reservation" found in 11 U.S.C. §1151 -- the Major Crimes Act.
[34] 25 U.S.C. § 1922.

to prevent imminent physical damage or harm to the child."[35] Moreover, ICWA expressly provides that the state agency involved must "expeditiously" initiate a child custody proceeding that complies with ICWA, transfer jurisdiction to the appropriate tribe, or restore the child to the parent or Indian custodian.[36]

ii. Public Law 280

Some ambiguity regarding the exclusivity of tribal court jurisdiction exists in states governed by Public Law 280. Public Law 280 is a 1950's Congressional enactment granting states the option to extend their jurisdiction over reservations within their borders.[37] In 1963 Idaho adopted legislation pursuant to Public Law 280 purporting to exercise jurisdiction over "dependent, neglected and abused children."[38] The ICWA jurisdictional provisions appear to be a revision of P.L. 280 with regard to Indian child welfare cases. Thus to the extent that ICWA and state jurisdiction under P.L. 280 appear to conflict, the ICWA jurisdictional provisions should control.

2. Transfer jurisdiction

If an Indian child is the subject of a foster care placement or termination of parental rights proceeding in state court, the parents, Indian custodian, or tribe my request that the case be transferred to tribal court.[39] The transfer jurisdiction provisions do not apply to pre-adoptive or adoption proceedings that are not also foster care placements or termination of parental rights proceedings.

The court may decline to transfer the case if either parent objects to the transfer. In addition the state court may retain the case if the tribal court declines to accept jurisdiction. Finally, the court may decline to transfer the case if it finds good cause not to transfer.

a. Good cause not to transfer

The burden of proving good cause to decline a transfer is on the party opposing the transfer. Good cause not to transfer a case must be shown by clear and convincing evidence. The legislative history suggests that the good cause requirement should be treated as a "modified doctrine of *forum non conveniens*."[40] Courts should consider the rights of the child as an Indian, the rights of the Indian parents or custodian, and the rights of the Tribe in making the good cause determination.[41]

The BIA Guidelines suggest that good cause not to transfer a case exists under the following circumstances:

- ✓ The Indian child's tribe does not have a tribal court as defined by ICWA;
- ✓ The proceeding was in an advanced state when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing;
- ✓ The Indian child is over twelve years of age and objects to the transfer;

[35] *Id*.
[36] *Id.*
[37] 67 Statutes at Large 588 (1953).
[38] Idaho Code § 67-5101.
[39] 25 U.S.C. §1911(b).
[40] H.R. REP. NO. 1386, 95th CONG., 2d SESS. 21 (1978)(hereinafter House Report).
[41] *Id.*

- ✓ The evidence necessary to try the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses; or
- ✓ The parents of a child over five years of age are not available and the child has little or no contact with the tribe or members of the tribe.[42]

The BIA Guidelines specifically provide that "[s]ocioeconomic conditions and the perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists."[43]

i. Advanced nature of the proceeding

The BIA Guidelines suggest that good cause to decline transfer exists when a) the proceedings are at an advanced stage when the request is made and b) the party requesting the transfer did not act promptly after receiving notice of the proceedings. Tribes often do not seek transfer of cases while they are in the child protection system and before they reach the parental termination stage. While the practice varies from tribe to tribe, the adjudication and disposition in the child protection arena is expensive and time consuming for many tribal court and social service systems. If, however, parental termination appears likely, many tribes will either intervene or seek transfer of the case at that time. For many tribes the concept of parental termination is a culturally foreign notion. Tribal leaders and the social workers will often say that even if a state court terminates parental rights, in tribe's view that family relationship is still intact. Because the parental termination is generally treated as a separate action, courts routinely transfer at this stage. The possibility of such a transfer underscores the importance of active tribal involvement in child protection cases.

ii. Child over twelve years of age objects

The BIA Guidelines suggest that a court should decline transfer if the Indian child is over 12 years of age and objects to the transfer. This ground for denying transfer jurisdiction was rejected by the drafters of ICWA. The child does not have standing in an ICWA case to directly request transfer or to object to transfer. ICWA does not give the child a formal voice in placement. This approach contrasts sharply with the approach of many states which give older children a voice in decisions made about them. The drafters of ICWA were concerned about defeating the goal of the Act through a child's veto of jurisdiction, especially given the malleability of even older children.

The BIA included this ground for denying transfer in the Guidelines because it clearly believed that an older child should play a role in decisions affecting his or her placement. As the Guidelines have not been adopted as regulations by the Department of the Interior, a court should not feel compelled by the Guidelines to decline transfer jurisdiction based on the child's objection. While the child's objection, by itself, may not be a basis for transfer under the Act, a court should consider an older child's views as a factor when making a decision about transfer.

iii. Child has little contact with tribal members

The BIA Guidelines suggest that where the natural parents of a child are unavailable, such as where their parental rights have already been terminated, and where the child is over five years

[42] BIA Guidelines § C.3.
[43] *Id.*

of age and has had little or no contact with the tribe or its members, a court may find good cause to decline transfer. The reasoning behind this provision appears to be that a younger child has a greater ability to adapt to the new culture context of the Tribe.

iv. Inconvenient forum

Finally, the BIA Guidelines support a finding of good cause not to transfer where the evidence in the case could not be adequately presented without undue hardship to parties or witnesses. This is the most common basis upon which courts decline to transfer jurisdiction. Care should be taken that this ground is not used inappropriately to defeat the purpose of ICWA. The BIA Guidelines advise that neither the perceived inadequacy of tribal court systems nor the socio-economic conditions on the reservation may be a basis for declining transfer. Thus a court should ensure that transfer to tribal court will in fact wreak undue hardship and cannot be abated through the use of standard procedures, such as the taking of testimony telephonically.

b. Best interests of the Indian child

Some courts have declined to transfer a case to tribal court based on the best interests of the Indian child.[44] Neither the express language of the statute, the BIA Guidelines, nor the legislative history support the notion that the best interests of the child is a basis for finding good cause to decline to transfer a case to tribal court.

State courts rejecting the use of the best interests of the child standard to defeat transfer jurisdiction have reasoned that the purpose of ICWA was to limit the role of state courts in the placement of Indian children. These courts have recognized that ICWA imposes a legislative presumption that it is in the best interests of an Indian child to maintain contact and ties with his or her tribe and tribal community.[45]

D. Notice of an ICWA Action

Notice must be provided to the parents, the Indian custodian, the Indian child's tribe, or, if the tribe is not identified, to the Department of the Interior. ICWA requires that notice must be by registered mail and must be received at least ten days prior to the proceeding. The BIA Guidelines provide for personal service in lieu of registered mail.[46] Finally, notice and service must also comply with state requirements. Thus, in Idaho, personal service is required, just as it is in child protection, termination of parental rights and adoption cases.[47]

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[44] In the Interest of J.L., 654 N.W. 2d 786 (S.D. 2002); In re Appeal in Maricopa County Juvenile Action No JS-8287, 828P. 2d 1245 (Ariz. App. 1991)(best interests of child are relevant consideration in good cause determination); In re Robert T, 246 Cal. Rptr. 168(App. 1988)(Court may consider best interests of the child in deciding whether to decline transfer); In Matter of Adoption of T.R.M., 525 N.W. 2d 298 (Ind. 1988)(finding that national policy of protecting best interests of children required consideration of best interests as grounds to decline to transfer jurisdiction); In re M.E.M., 635 P. 2d 1313 (Mont. 1981)(clear and convincing evidence of best interests of the child could constitute good cause to decline transfer jurisdiction).

[45] In the Interest of Eleanor Armell, 550 N.E. 2d 1060 (Ill. App. 1990)(considering state best interest of the child test as a basis for denying transfer to tribal court would be contrary to the legislative intent of ICWA and would frustrate the act's purpose); Yavapai-Apache Tribe v. Meja, 906 S.W. 2d 152 (Tex. App. 1995)(consideration of best interests of the child as a basis for denying transfer jurisdiction was an abuse of discretion, inconsistent with the purposes of ICWA); In the Interest of J.L.P., 870 P. 2d 1252 (Colo. App. 1994)(best interests of the child standard inapplicable to decisions to transfer jurisdiction).

[46] BIA Guidelines § B.5(e).

[47] *See* Idaho Code §§ 16-1611, 16-2007 and 16-1506.

ICWA provides that the notice must contain the following information:

- ✓ Name of child;
- ✓ Tribal affiliation;
- ✓ A copy of the petition or other document initiating the action;
- ✓ Name of the petitioner and attorney;
- ✓ Right to intervene;
- ✓ Right to appointed counsel;
- ✓ Right to 20 additional days to prepare;
- ✓ Location, address, and phone of the court;
- ✓ Right to transfer to tribal court;
- ✓ Consequences of action; and
- ✓ Confidentiality.

1. Notice to the Indian Child's Tribe

The child's tribe has the right to notice in any involuntary foster care or termination of parental rights proceeding involving an Indian child.[48]

Failure to provide notice is jurisdictional and deprives the court of ongoing authority in the case.[49] However, courts have held that if the need for notice is not discovered until after the proceeding has begun, rulings of the court to that point are not void. For example, where the proceeding begins as a voluntary proceeding but becomes involuntary, notice must be sent at the time the case becomes involuntary. Likewise, if it is discovered during the proceedings that the child is an Indian child, notice must be given at that point. Even where notice should have been provided but wasn't, courts do not typically invalidate all actions taken in the potentially-defective proceedings. Rather, those actions may be validated if, upon providing notice it turns out that the child was not an Indian child, or, if the tribe does not intervene in the action or seek transfer.[50]

Finding that the child is an Indian child is not a prerequisite to providing notice. ICWA provides for notice to a tribe or tribes when the court has "reason to believe" that the child is an Indian child. The drafters of ICWA anticipated that the tribe should participate in the determination of whether the child was eligible for membership in an Indian tribe. The BIA Guidelines suggest that notice to a tribe be provided if any of the following facts are present in a case:

- ✓ A party, tribe, or private agency informs the court that the child may be an Indian child;
- ✓ A public welfare agency discovers relevant information indicating that the child may be an Indian child;
- ✓ The child believes s/he is an Indian child;
- ✓ The child resides or is domiciled in an Indian community or the child's biological parents or Indian custodian is from an Indian community; or
- ✓ An officer of the court has information that the child is an Indian child.[51]

[48] 25 U.S.C. § 1912(a).
[49] *See, e.g.*, In re K.A.B.E., 325 N.W.2d 840 (S.D. 1982); In re M.C.P., 571 A. 2d 627 (Vt. 1989).
[50] *See, e.g.* Family Independence Agency v. Maynard, 592 N.W. 2d 751 (Mich. App. 2999).
[51] BIA Guidelines § B.5.

E. Notice to the child's parents or Indian custodian

Upon receiving notice, ICWA provides that the child's parents (regardless of whether they are Indian) or Indian custodian may request and are automatically entitled to an additional twenty days to prepare for the proceeding.

F. Tribal Intervention in State Court Proceeding

An Indian child's tribe has the right to intervene at any point in a foster care placement or termination of parental rights proceeding.[52] The right to intervene is not limited to "involuntary" proceedings even though the Act only provides for notice in "involuntary" proceedings. Because of the right of intervention and the right to seek transfer of the case, the best practice should be to provide notice to the tribe in every case.

G. Emergency Removal of an Indian Child

ICWA permits the emergency removal (from a parent or living situation) of a child who is domiciled on the reservation only where the child is temporarily off the reservation.[53] When a child is removed under this provision, the BIA Guidelines provide that :

- ✓ Immediate inquiry into the child's residence and domicile should be made;
- ✓ Affidavit accompanying request for continued physical custody should contain detailed information regarding the people involved and circumstances justifying the removal;
- ✓ Absent extraordinary circumstances, temporary emergency custody should not last more than 90 days.[54]

H. Right to Counsel

ICWA provides for counsel for any indigent parent or Indian custodian in "removal, placement or termination proceedings."[55] This right to counsel applies whether the case initiated by the state or a private party. Furthermore, the right to counsel applies to pre-adoptive, adoption, foster care placements, and TPR proceedings.

If there is no state right to counsel in all the circumstances covered by ICWA, a state court can apply to the Department of Interior for reimbursement of the cost of providing counsel.

Appointment of an attorney for the Indian child is not required.

I. Full Faith and Credit

ICWA requires that state and federal courts accord full faith and credit to the "public acts, records and judicial proceedings of any Indian tribe relating to any child custody proceedings to the same extent states would accord credit to proceedings of other states."[56] Thus, at least as to child custody proceedings, ICWA eliminated confusion in the case law about whether tribal court determinations are entitled to full faith and credit.

[52] 25 U.S.C.§1911(c).
[53] 25 U.S.C. § 1922.
[54] BIA Guidelines §B.7.
[55] 25 U.S.C. § 1912(b).
[56] 25 U.S.C. §1911(d).

An Indian tribe's determination that a child is a member of the tribe or is eligible for membership in the tribe is entitled to absolute allegiance. Courts have recognized this principle even where the child did not have any Indian blood.

J. Substantive Requirements of ICWA

1. Involuntary Foster Care Placements

In order to remove an Indian child from his or her home in an involuntary foster care proceeding, a court must find, under ICWA, that "active" efforts to provide remedial and/or rehabilitative services to prevent breakup of the Indian family have been unsuccessful.[57] In addition, a court must find by clear and convincing evidence, supported by qualified expert witnesses, that continued custody with the Indian parents or custodian is likely to result in serious emotional or physical damage to the child.[58]

a. Active efforts

The ICWA requirement of "active efforts" to prevent breakup of the Indian family is a higher standard than the reasonable efforts findings generally required under the state law and the Adoption and Safe Families Act.[59]

The ICWA standard requiring active efforts to prevent breakup of the Indian family is a higher standard than the ASFA reasonable efforts standard.

The comments to the BIA Guidelines make clear that "breakup" means more than divorce. The Comments state that "Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health."[60]

The legislative history makes clear that Congress intended the efforts to prevent family breakup to be "energetic" and that that efforts be culturally relevant. The BIA Guidelines provide that active efforts "shall take into account the prevailing social and cultural conditions and the way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers."[61]

Under ICWA, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child – the child must be likely to suffer serious emotional or physical damage.

Section 1912(d) does not include a specific burden of proof. Most courts have concluded that the burden of proof applicable to the particular proceeding is applicable to the "active efforts" requirement. Thus, in an involuntary foster care placement the burden of proof would be clear and convincing.[62]

[57] 25 U.S.C. § 1912(d).
[58] 25 U.S.C. § 1912(e).
[59] ICWA HANDBOOK, *supra* note 6, at 57-58 (1995).
[60] BIA Guideline § D.2, comment.
[61] BIA Guidelines § D.2.
[62] ICWA HANDBOOK, *supra* note 6 at 58.

b. Serious emotional and physical damage

As previously stated, Congress intended the threat to the child be substantial before the state can break up an Indian family by removing a child. Addressing the type of evidence necessary to meet the standard, the BIA Guidelines state that "evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding."[63] Rather, the Guidelines suggest that the evidence must show a "causal relationship between the conditions that exist and the damage [to the child] that is likely to result."[64]

The serious emotional or physical damage test of ICWA was intended to replace the best interests of the child test and other similar standards. Under this test, unfitness, abandonment, and unstable home environment are not automatic grounds for removal of an Indian child *unless* the child is in danger.

Prior to the enactment of ICWA, Indian children were often removed when they were in the care of relatives, receiving medical care from a tribal member, or receiving a non-traditional tribal education. By enacting the serious emotional damage standard, Congress intended to prevent removal under such circumstances.

c. Qualified expert witness

ICWA requires that the court's finding of likely serious emotional or physical damage to a child be supported by the testimony of a qualified expert witness.[65] The legislative history of ICWA establishes that a qualified expert must have knowledge of Indian culture and traditions and must be capable of giving an opinion on whether a particular Indian child is suffering emotional or physical harm because of his or her specific family situation.[66] Congress envisioned that the qualified expert would be more than a normal social worker.[67] The purpose of the expert witness requirement was to diminish the risk of bias by providing information to the court about tribal customs and practices. Thus courts should ensure that ICWA experts have sufficient knowledge related to tribes to fulfill the role intended by Congress.

The BIA guidelines suggest that an ICWA expert should be:

- ✓ a member of child's tribe with knowledge of tribal customs relating to family organization and child rearing; or
- ✓ a lay person with "substantial experience" delivering services to Indians and "extensive knowledge" of tribal customs and practices; or
- ✓ a professional w/ "substantial education and experience in his or her area of specialty."[68]

[63] BIA Guidelines § D.3(c).
[64] *Id.*
[65] 25 U.S.C. § 1912(e).
[66] House Report at 22.
[67] House Report at 21.
[68] BIA Guidelines §D.4

In *In re Baby Boy Doe*,[69] the Idaho Supreme Court upheld the finding of the trial court that an expert with a M.S.W. degree who was a member of the Ute Tribe and a judge of its tribal court was a qualified expert witness under ICWA.

2. Involuntary Termination of Parental Rights

Involuntary Termination of parental rights under ICWA requires proof ***beyond a reasonable doubt.***

Like involuntary foster care proceedings, involuntary actions to terminate parental rights must be supported by the testimony of a qualified expert witness. In addition, involuntary termination of parental rights under ICWA requires proof "beyond a reasonable doubt" that continued custody would result in "serious emotional or physical harm."[70] The extremely high standard of proof for termination of parental rights in ICWA cases reflects the fact that for most Indian people, termination of parental rights is literally a foreign concept. In many instances, tribal members will either refuse or be unable to recognize parental termination orders entered by state courts.

In addition to terminating the rights of parents of an Indian child, the rights of the Indian custodian must also be terminated in applicable cases.[71]

3. Consent to Termination of Parental Rights

ICWA provides that a parent of an Indian child may consent to termination of his or her parental rights. The consent must be in writing and recorded before a judge in a court of competent jurisdiction. The judge recording such a consent must certify that the consequences of consenting to voluntary termination of parental rights were fully explained and were understood by the parent. Thus the parent consenting to termination of parental rights must be present before the judge so that he or she may be questioned regarding the circumstances of the termination. Such a consent must be executed more than ten days after the birth of a child.

ICWA also provides for the withdrawal of consent. The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent should be sufficient. The right to withdraw consent to termination applies even when the parent may not have the right to immediate custody of the child. The rights of a parent to withdraw consent expires upon the entry of the order terminating parental rights or upon the entry of an order of adoption.

However, even after a final decree has been entered in the case, consent can be withdrawn and custody regained based on fraud and duress. This right to withdraw consent based on fraud and duress exists unless the child has been adopted for more than two years.

4. Federal non-ICWA Findings Required

In addition to meeting the requirements of ICWA, in a Child Protective Act case, the court must also make all the necessary state and federal findings necessary to preserve Title IV-E funding for the child. Federal law requires the court to make a documented, case-specific finding within 60 days of the child's removal from the home that IDHW has made reasonable efforts to avoid

[69] 902 P. 2d 477 (Idaho 1996).
[70] 25 U.S.C. § 1912(f).
[71] See 25 U.S.C. §§ 1912(f), 1913

removal. This finding is required to preserve the child's IV-E funding. The federal requirement is discussed in detail in Chapter IV.D.2 of this Manual. In addition, federal law requires a documented, case-specific finding at the first hearing sanctioning removal of the child from the home that remaining in the home is contrary to the welfare of the child and that removal is in the child's best interests. Again, This finding is necessary to preserve the child's IV-E finding.

5. Voluntary Proceedings Under ICWA

The purpose of ICWA is not only to eliminate unwarranted involuntary removals of Indian children, but also to make voluntary displacement of children more difficult. As a result, ICWA applies both to voluntary and involuntary proceedings that may result in the removal of an Indian child from his or her home. It also applies not only to public proceedings but may also apply to many private proceedings, whether voluntary or involuntary.

a. Voluntary foster care placements

ICWA uses the term "voluntary" in two distinct ways. The first situation, which this Manual refers to as a "voluntary placement," is an out-of-home placement in which parents may demand immediate return of the child. This first type of voluntary placement is not governed by ICWA. The second situation, referred to as a "voluntary *foster care* placement," is were the parent voluntarily enters into an arrangement in which the parent may *not* demand immediate return of the child. This type of placement is governed by ICWA, and the parent's consent to the placement must comply with ICWA.

i. Voluntary placements where parent can demand immediate return of child

The ICWA definition of "child custody proceeding" excludes voluntary placements of an Indian child where the parent can regain custody of the child on demand and without resorting to a formal court process. However, even in a situation where such a voluntary placement is intended, if the third party refuses to return the child, the situation may be governed by ICWA.[72]

When parents voluntarily place a child with a third party, that party is an Indian Custodian under ICWA—even if the placement is temporary

This type of voluntary placement can arise under a number of circumstances. Many voluntary placements are truly private arrangements made by families for the care of children. Such voluntary arrangements – leaving children in the care of grandparents or other close relatives or friends, for example – are excluded from the Act. The caregiver in such a voluntary inter-familial setting probably qualifies as an Indian Custodian for purposes of any future ICWA action.

Best Practice Recommendation:
Agency-supervised voluntary placements of Indian children should be treated as if ICWA applies:

- The child's tribe should be notified of such placements, and
- The placement should comply with the ICWA placement preferences.

In addition to such purely private placements,

[72] 25 U.S.C. § 1903(1). The definition of "foster care placement" turns on whether the parent may have the child returned upon demand. *See, e.g.* In re Adoption of K.L. R. F., 515 A. 2d 33 (Pa. Super. 1986).

[73]however, voluntary placement of Indian children may arise through a voluntary agreement with IDHW.[74] If the agreement is structured so that the parent may demand return of the child at any time, ICWA does not apply to the placement. Even so, such voluntary placements of Indian children can easily become involuntary if the family situation continues to deteriorate and the decision is made to decline to return the child to the parents. As a result, the best practice is to treat agency-supervised placements of Indian children under a voluntary agreement as if ICWA applies. Thus, the child's tribe should be notified of the voluntary placement, and the placement should comply with the ICWA placement preferences. If these practices are not followed and the case becomes involuntary, the placement of the child may need to be disrupted in order to meet the requirements of the Act.

b. Consent to voluntary foster care placements

A parent may consent to a voluntary foster care placement in which the parent may not demand immediate return of the child. ICWA applies to such placements and requires that the consent must be in writing and recorded before a judge in a court of competent jurisdiction. The judge recording such a consent must certify that the consequences of consenting to voluntary foster care placement were fully explained and were understood by the parent. Thus, as with consents to parental termination, the parent must appear before the judge for questioning. Such a consent must be executed more than ten days after the birth of a child.[75]

Because the parent cannot demand return of the child, the child's tribe must be notified of this type of placement, and the placement must comply with ICWA.

ICWA also provides for the withdrawal of consent at any time in a foster care placement.[76] The Act imposes no formal requirements for withdrawal of consent. Thus, even a verbal withdrawal of consent should be sufficient. If consent is withdrawn, the parent has an unqualified right to regain custody of the child *unless* an involuntary action is then initiated.[77]

Finally, ICWA provides that the parent or Indian custodian of the child may regain custody of the child where the consent was improperly obtained.[78]

K. Placement Provisions of ICWA

One of the most important purposes of ICWA is to ensure the placement of Indian children in homes "which will reflect the unique values of Indian culture." In *Holyfield*, the United States Supreme Court characterized the placement preferences as "the most important substantive requirements imposed upon state courts."[79] Congress recognized that even where the child was removed from his or her parents, the child's best interests and the interests of the tribe would be

[73] 25 U.S.C. § 1902
[74] Voluntary agreements are discussed in this Manual in the materials dealing with Shelter Care and the Adjudicatory Hearing – Chapters IV and V.
[75] 25 U.S.C. § 1913(a).
[76] 25 U.S.C. § 1013(b).
[77] ICWA HANDBOOK, *supra* note 6 at 69-71.
[78] 25 U.S.C. § 1913(d).
[79] 430 U.S. at 36.

served by placing the child in a setting that facilitates the maintenance of tribal and cultural ties.[80]

1. Foster Care and Pre-Adoptive Placements

The placement preferences of ICWA apply to both voluntary and involuntary placements, to pre-adoptive placements, and to placements made in contemplation of termination of parental rights.[81] Section 1915 of the Act requires that the child be placed in the "least restrictive setting that most approximates the child's family and that is within a reasonable proximity to the child's home."[82]

Under the Act, the standard for whether a particular placement is acceptable is that it is within the "prevailing social and cultural standards of the Indian community in which the parent or extended family resides" or with which the parent or extended family "maintain social or cultural ties."[83] The ICWA foster care placement preferences apply even where the child has not resided in an Indian family.[84]

Thus, in the absence of good cause to the contrary, ICWA imposes the following placement preference, in the order of their applicability:

- ✓ A member of Indian child's extended family (whether Indian or non-Indian);
- ✓ A foster home licensed, approved, or specified by child's tribe;
- ✓ An Indian foster home licensed or approved by an authorized non-Indian agency; or
- ✓ An institution for children approved by an Indian tribe or operated by an Indian organization and that is suitable to meet the child's needs.[85]

ICWA permits tribes to change the order of the placement preferences by resolution and requires that state courts adhere to the tribally-altered preferences. The tribal resolution must comply with the ICWA mandate that the placement be the "least restrictive setting … ."[86]

ICWA provides that the court may consider the preference of the child's parents for placement, but such parental preferences are not dispositive of placement issues.[87]

2. Good Cause to Deviate from the Foster Care Placement Preferences

The Act provides that courts may deviate from the placement preferences if there is "good cause" to do so. State courts are in conflict regarding whether the level of proof for good cause is a preponderance of the evidence or clear and convincing evidence. At the appellate level, the standard of review of trial court decisions deviating from the preferences is abuse of discretion.

ICWA does not define "good cause". However, the BIA Guidelines provide that good cause may be found under the following circumstances:

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[80] 25 U.S.C. § 1902.
[81] 25 U.S.C. § 1915(b).
[82] 25 U.S.C. § 1915.
[83] 25 U.S.C. § 1915(d).
[84] *See* ICWA HANDBOOK, *supra* note 6 at 84-85.
[85] 25 U.S.C. § 1915(b).
[86] 25 U.S.C.§ 1915(c).
[87] 25 U.S.C. §1915(c) .

- ✓ At the request of the biological parents or the child, when the child is of sufficient age.
- ✓ When mandated by the extraordinary physical or emotional needs of the child, as established by testimony of a qualified expert witness; or
- ✓ When the unavailability of suitable families for placement persists, even after a diligent search has been completed for families meeting the preference criteria.[88]

a. Request of the biological parents or child.

Section 1915(c) of ICWA provides that a state court should consider the wishes of the parent, where appropriate, when making placement decisions. This first ground for deviating from the placement preferences in the BIA Guidelines appears to be an attempt to implement this section of the Act. Where a foster care placement is being made, the wishes of the parent might carry significant weight, where appropriate. However, in cases involving an adoptive placement where the parent's rights have been terminated, a parent's wishes regarding the adoptive placement should not be entitled to significant weight. This is especially true where the parent's wishes would not serve the purposes of the Act. The United States Supreme Court made clear in *Holyfield* that a parent should not be able to unilaterally defeat the intent of the Act. [89] Finally, the Comments to this section of the Guidelines suggest that parental requests should be weighed to protect the confidentiality of parents who request deviations from the Guidelines.[90]

In addition to the wishes of the parents, the BIA Guidelines suggest that the wishes of an older child might be the basis for deviating from the placement preferences of the Act. The Guidelines do not define "older child." In other contexts (e.g. objections to transfer jurisdiction), ICWA provides for the consideration of the wishes of a child older than twelve years of age.

b. Extraordinary emotional or physical needs of the child

The BIA Guidelines provide that where the child is in need of "highly specialized treatment services that are unavailable in the community where families who meet the preference criteria reside," a court may deviate from the placement preferences. The Guidelines require that the opinion of a qualified expert witness support this ground for deviation.[91]

c. Inability to comply with the placement preferences

The Guidelines permit deviation from the placement preferences where, after a diligent search, a placement complying with the preferences cannot be located. The Guidelines define a diligent attempt as "at a minimum, contact with the child's tribal social services program, a search of all county or state listings of available Indian homes, and contact with nationally known Indian programs with available placement resources."[92]

3. Adoptive Placement Preferences

The placement preferences for adoptive placements differ from the preferences for foster care placements and pre-adoptive placements. Pursuant to §1915(a), preference must be given for the adoption of an Indian child to:

[88] BIA Guidelines §F.3.
[89] 430 U.S. at 38.
[90] BIA Guidelines §F.3 commentary.
[91] BIA Guidelines §F.3 and commentary
[92] *Id.*.

- ✓ a member of the Indian child's extended family;
- ✓ other members of the Indian child's tribe; and
- ✓ other Indian families.[93]

As with the preferences in foster care placements, the court must follow these preferences in adoptions unless the tribe has altered the preferences by resolution or good cause exists to deviate from the preferences.

4. Removal from a Foster Home

Every placement of an Indian child must be made in accordance with the placement preferences. Thus, if an Indian child is removed from a foster home or other institution, the placement preferences apply to future placements, unless the removal is for the purpose of returning the child to his or her parents or Indian custodian.[94]

5. Vacation of an Adoption Decree

If an adoption decree is set aside or the adoptive parents voluntarily terminate their parental rights, the biological parents or prior Indian custodian may petition the court for return of custody. ICWA provides that custody shall be restored unless return would not be in the child's best interests.[95]

[93] 25 U.S.C. § 1915(a).
[94] 25 U.S.C. § 1916(b).
[95] 25 U.S.C. § 1915(a).